

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-058

ZANDRA GLASS

APPELLANT

VS. **FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

** ** *

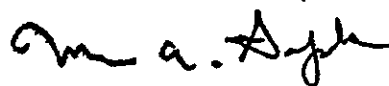
The Board at its regular April 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 14, 2014, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 16th day of April, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Zandra Glass
Stephanie Appel

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-058**

ZANDRA O. GLASS

APPELLANT

**V. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS,
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on November 21, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Kim Hunt Price, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Zandra O. Glass, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Angela Cordery.

By post-hearing Order, the parties were given until December 23, 2013, to file simultaneous closing briefs, with responses due on January 10, 2014. Subsequently, after a request for additional time, it was ordered that the parties would have until January 23, 2014, to submit their simultaneous closing briefs, and until February 10, 2014, to file responses. The Appellee filed its brief on January 22, 2014. The Appellant did not file any brief, and by Order dated February 11, 2014, the case was submitted to the Hearing Officer for a final decision.

BACKGROUND

1. By letter dated January 14, 2013, the Appellant, Zandra O. Glass, was suspended from her position as a Correctional Officer at the Kentucky State Reformatory with the Department of Corrections for three working days for Poor Time and Attendance, i.e. excessive tardiness. The letter specifically stated:

As reported by Senior Captain Scott Jordan and since receiving a written reprimand dated December 21, 2012 for Excessive tardiness, you have failed to improve in your time and attendance by continuing to show a total disregard for the policies requiring you to report to work in a timely manner. On December 26, 2012, you arrived to work and clocked in

at 7:55 a.m., 25 minutes after your scheduled start time. On December 27, 2012, you arrived to work and clocked in at 7:47 a.m., 17 minutes after your scheduled start time. On December 29, 2012, you arrived to work and clocked in at 8:07 a.m., 37 minutes after your scheduled start time.

Your actions are in direct violation of CPP 3.14 (Employee Time and Attendance Requirements) section II-7, . . . KSR 03-00-01, section I(A) #C, . . . (as well as) 101 KAR 2:095 Attendance and Hours of Work.

A review of your personnel file indicates you received a written reprimand dated December 21, 2012 for poor time and attendance for excessive tardiness, a written reprimand on January 13, 2011 for time and attendance, a three (3) day suspension dated August 19, 2011 for Poor Work Performance and a written reprimand dated November 6, 2008 for misconduct.

2. Appellant filed a timely Appeal with the Personnel Board on March 13, 2013, stating, "I have medical issues that, I feel that, should be taken into account, that should excuse my suspension. I am receiving treatment for the issues and have had some improvement, with my poor time and attendance."

3. **Amy Ganschow** is the Human Relations Administrator Institutional for the Kentucky State Reformatory. She has been employed with the Department of Corrections for 12 years, and works directly for the Warden concerning disciplinary actions, as well as payroll and registers for new employees. She is the custodian for personnel files, and reviews disciplinary drafts. She then forwards those disciplinary drafts to Stephanie Appel for review.

4. Ganschow testified that Appellant was initially presented with an Intent to Suspend letter (Appellee's Exhibit 1) on January 9, 2013. Appellant requested that she have an interview with the Warden within two working days, and same was granted. Thereafter, the January 14, 2013 suspension letter (Appellee's Exhibit 2) was issued.

5. Appellee's Exhibit 3 was a January 13, 2011 memorandum of a written reprimand Appellant received for Poor Work Performance for arriving to work late 19 times from December 1 – 31, 2011.

6. Appellee's Exhibit 4 was the memorandum of a verbal warning issued March 29, 2012, for excessive lateness after Appellant clocked in late on March 29, 2012, and had clocked in late 13 times since March 1, 2012.

7. Appellee's Exhibit 5 was a memorandum issued June 26, 2012, with another warning for excessive tardiness when Appellant clocked in late, and had accumulated 28 late clock-ins since March 29, 2012.

8. Appellee's Exhibit 6 was a verbal warning for excessive lateness issued October 19, 2012, due to the fact that on October 15, 2012, Appellant clocked in 47 minutes late, and had clocked in late 44 times since August 4, 2012.

9. Appellee's Exhibit 7 was another verbal warning dated December 11, 2012, as a result of Appellant clocking in 44 minutes late on December 10, 2012, and having clocked in late 21 times since October 19, 2012.

10. Appellee's Exhibit 8 was a written reprimand for Poor Work Performance dated December 21, 2012, which stated Appellant had received a verbal warning on December 12, 2012, and after that had arrived 13 minutes late on December 13, 2012, and 31 minutes late on December 16, 2012.

11. Appellant began as a Correctional Officer with the Cabinet on February 22, 2005.

12. **Lieutenant Jeanette Wall Cisco** is on the Adjustment Committee, and does write-ups for inmates. She worked in the Captain's office prior to that, and did the verbal warnings introduced as Appellee's Exhibits 6 and 7. She has worked for the Department of Corrections for 10 years. She kept track of how many times employees were late, and followed up with memos. Since those memos were issued, she has talked to Appellant, whose response was that for medical reasons she could not get up on time. As a result, Lt. Cisco suggested that perhaps it would be better for Appellant to work a different shift.

13. Kentucky State Reformatory Policy and Procedure, KSR 03-00-01 was introduced as Appellee's Exhibit 10. Sections I(c) and III(a) had been violated according to Lt. Cisco. In addition, she introduced Kentucky Corrections Policy and Procedure CPP 3.14 as Appellee's Exhibit 11, and she felt that Section 2.7 was violated by Appellant's excessive tardiness.

14. Lt. Cisco had worked with Appellant almost the entire period she had been at KSR. When she was a clerk on the second shift, the Captain did have a standard policy that if staff was going to be working at the hospital, employees could report to the hospital rather than to the facility and then go back into Louisville at the hospital. She continued to do that in operations. This was not standard for other shifts, but she felt it was a courtesy to employees to keep them from having to drive all the way in to the facility. She further acknowledged that if an employee came in to the facility, and then had to drive back to the hospital in Louisville, that the other officer at the hospital would have to stay overtime as the on-coming person drove there, which would be an inefficient use of employees.

15. Lt. Cisco also acknowledged that another employee had been granted permission to come in one hour late because of a childcare issue, but she stayed an extra hour as well.

16. Lt. Cisco verified that Appellant had never refused to work a shift change, and had agreed to change her shift to work in the kitchen, and had problems getting moved from the kitchen post to her current post.

17. Lt. Cisco verified that Appellant did a good job at any post on which she works.

18. **Warden Clark Taylor** testified he has been with the Department of Corrections for 25 years. He was a Deputy Warden from 2004 – 2005, and a Warden at Luther Luckett or Kentucky State Reformatory since 2009.

19. Warden Taylor testified that he requested the three-day suspension because of the severity of Appellant's conduct. She had a significant issue with tardiness, and had been counseled more than one time to improve. He met with Appellant after the Intent to Suspend letter was issued on January 10, 2013, at her request, and even after their discussions felt that it was appropriate to pursue this suspension. He felt that her three-day suspension was following progressive discipline.

20. When questioned about intermittent Family Medical Leave Act (FMLA) leave, Warden Taylor stated it was available, but an employee must notify his supervisor in a timely manner that you are not going to be at work, and are using FMLA leave.

21. At the meeting with Appellant, she told the Warden she had sleep apnea, which made it hard for her to get going in the morning. Warden Taylor told her that she had to be at work on time, and therefore would need to begin her day earlier if that is what it took to get going in the morning. She did inform him she had been seeing a doctor and therapist, and divulged she had previously had a problem with alcohol abuse, and had gone through several medications to alleviate those problems.

22. Warden Taylor was aware that Appellant rarely called in or did not report to work at all. He stated his belief that intermittent FMLA could not be used to cover tardiness, because being there on time is an essential function of the Correctional Officer's job duties. He had never seen Appellant's Exhibit 1, a doctor's statement dated July 29, 2013, from Louisville Pulmonary Care PLLC, which indicated Appellant was suffering OSA (Obstructive Sleep Apnea) and is intolerant to CPAP, which is interfering with her sleep quality and causing sleepiness. Warden Taylor also reviewed Appellant's Exhibit 2, an FMLA Request for Leave when Appellant had right knee replacement in May 2009 for approximately two months. He had never been aware of this prior to the evidentiary hearing.

23. Warden Taylor was aware of the fact that a day shift clerk had received an altered schedule, coming in one hour late and staying one hour late daily. He only learned that the day prior to the evidentiary hearing, and he would not have condoned that schedule change had the issue been brought before him.

24. Warden Taylor stated there are times when employees have to come into the facility even if they have to return to the hospital, to stay with an inmate, and even though that may cause overtime, it is sometimes necessary due to the dynamics of the different inmates. Either way, that does not affect Appellant's disciplinary actions or tardiness.

25. **Captain Mike Williams** testified he was aware that Appellant had been drug tested under suspicion of drug activity on August 26, 2012, and only tested positive for tobacco use. He is an Internal Affairs Investigator and stated that people who are subject to such

investigations are not always privy to what's being investigated. The only Internal Affairs investigation concerning Appellant occurred after the dates of her suspension.

26. **Officer John Evans** was posted in the control center for three years. Lt. Cisco asked him daily to call staff and tell them when they were posted at the hospital, so they could report directly to the hospital, rather than to KSR. The other lieutenants only rarely asked him to do so.

27. Evans had used FMLA since 2009. His post was changed because of excessive call-ins. He is still on FMLA. He misses work one to three times per week under FMLA, and has missed up to a week using intermittent FMLA. He was removed from the first shift dorm due to his FMLA and military training. He was never deployed because of his FMLA issues. He had brain tumors and had too many call-ins.

28. Evans verified that if there is a call-in, it is hard to find someone to stay over. Accreditation standards require certain numbers in staffing be maintained at all times. Evans has called Appellant as she was running late on occasions at the direction of the Captain's office. It is the Captain's responsibility to maintain staffing at the minimum levels required.

29. Evans stated that his FMLA is due to his Crohn's and colon, as well as cancer recovery, and he is always at work on time on the days that he is working.

30. **Lieutenant Jayne Hogan** testified that she had issued paperwork to Appellant for her lateness on the second shift. She stated third shift has regular employees at the hospital, and sometimes they had to come to the facility. She stated employees often call in ahead to see if they are needed at the hospital that day, but acknowledged that some overtime did exist by employees not calling in. She stated that Appellant worked a lot of hospital duty, and usually called in to check, but sometimes she did come in to the facility and then have to return to the hospital.

31. Lt. Hogan had been Appellant's supervisor, and Appellant had always done good work. She never erred in an inmate count. When in the nursing section, she was very helpful because Lt. Hogan had never worked in that section. She said Appellant consistently did her job. She stated Appellant does a good job any place she works in the institution. She also verified that Appellant was always willing to stay over or work overtime if needed. She acknowledged Appellant is not the only employee who is consistently late, but stated other such employees have taken measures to stop their tardiness.

32. In her testimony, **Appellant Zandra O. Glass** acknowledged she had been late for work. She felt she was entitled to FMLA on an intermittent basis for the periods of time she was late. She admitted Appellant's Exhibit 2, which was an application for FMLA leave, which she filed on May 12, 2010. This was based on a knee replacement surgery which she had. In addition, she submitted Appellant's Exhibit 3, an application for FMLA leave which was dated April 27, 2011, requesting leave for her lateness, and listing her conditions as morbid obesity, sleep apnea, osteoarthritis, GERD and bi-polar/mood disorder. It was not noted that this was ever received by the Appellee.

33. In addition, Appellant provided Appellant's Exhibit 4, which was a letter dated February 16, 2010, to Dr. Gary Davis from Dr. Mini K. Das, concerning a follow-up for her hypertension and hypertensive heart disease. It was acknowledged this letter had not been provided to the Cabinet.

34. Appellant's Exhibit 5 was a letter dated October 25, 2010, to Dr. Gary Davis again from Dr. Mini K. Das, discussing these similar issues. Again, it was acknowledged that this letter was not provided to the Cabinet.

35. Appellant's Exhibit 6 was a January 27, 2008 memorandum from Lieutenant Lloyd Roberts indicating for the year end 2007 evaluations, the Appellant had shown exceptional performance in every aspect of her job, and she was a model employee. As a result, she was given a Highly Effective score on her evaluation.

36. In addition to feeling that FMLA leave should apply, Appellant feels that time was wasted by the fact that many employees came into the facility, and then were sent back out to the hospital in Louisville, resulting in overtime of other employees. Therefore, she felt that if her lateness caused overtime to other employees, it was no worse than that circumstance.

37. Appellant testified that she had obtained her Bachelor's Degree in Criminal Justice and was trying to advance in her work, and she was trying to deal with all her medical conditions in order to avoid receiving disability.

38. Appellant acknowledged she had changed to various shifts, and still had problems with tardiness.

FINDINGS OF FACT

1. The Appellant, Zandra O. Glass, received written reprimands for tardiness on January 13, 2011, for arriving at work late 19 times during the month of December; a verbal warning dated March 29, 2012, due to having been tardy to work 13 times during the month of March; a verbal warning on June 26, 2012, for having been late 28 times between March 29, 2012, and June 26, 2013; a verbal warning October 19, 2012, for having been late 44 times from August 4, 2012, through the date of the warning; a verbal warning dated December 11, 2012, for having been late 21 times since October 19, 2012; and a written reprimand dated December 21, 2012, for having been late 2 additional times from October 19, 2012 through December 12, 2012.

2. The ultimate action which resulted in Appellant's three-day suspension was the fact Appellant continued to arrive to work tardy. After the written reprimand of December 21, 2012, she was tardy on December 26, 27 and 29, 2012.

3. Appellant's tardiness varied from a few minutes to nearly one hour and fifteen minutes.

4. KSR Policy and Procedure 03-00-01, Section I(C) states, "Unless prior approval has been granted, all staff shall report to work on time, and leave promptly at the end of their shift when properly relieved or as instructed."

5. KSR Policy and Procedure 03-00-01, Section III(A) and (B) state:

III. Reporting to Work Late

A. Employees shall be required to report to work as scheduled.

B. Employees consistently reporting to work late shall:

1. Receive a documented counseling session with the Supervisor;
2. Receive leave without pay for the unauthorized absence;
3. Have a written report regarding the excessive absences forwarded to the appropriate Department Head and the Personnel Office; and
4. Be recommended for disciplinary action.

6. Kentucky Corrections Policy and Procedure 3.14, Section II(A)(7), states: "All staff shall be at their work station at their scheduled start time."

7. 101 KAR 1:345 states:

Section 1. General Provision. Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

Section 4. Suspension.

(1) A suspension shall not exceed thirty (30) working days.

(2) An employee without status may also be suspended for a period not to exceed thirty (30) days and shall be entitled to the same provisions of notice contained in KRS 18A.095(8) with the exception of the right of appeal.

CONCLUSIONS OF LAW

1. The tardiness of the Appellant are excessive and in violation of KSR Policy and Procedures 03-00-01, Kentucky Corrections Policy and Procedure 3.14, as well as violating 101 KAR 1:345.

2. The Family Medical Leave Act does not allow intermittent leave to be taken for tardiness pursuant to the case of *Brown v. E. Maine Med. Ctr.*, 514 F. Supp. 2d 104 (D. Me. 2007). The Court stated that leave was not a defined term pursuant to statute or regulation, and that intermittent leave was defined as “FMLA leave taken in separate blocks of time due to a single qualifying reason.” In the case of *Brown* as in the case at hand, the individual absence was not to attend medical treatment or for recovery. In *Brown*, the employee could perform the functions of her position, and even received favorable employment reviews for doing so. She simply could not get to work on time. This is the exact same fact scenario as the case at hand. The Court specifically held that “Lateness is not leave.” *Brown* at 111. Thus, Appellant cannot claim FMLA leave to cover her tardiness.

3. The Americans With Disabilities Act (ADA) also does not protect tardiness. It prevents discrimination against “Qualified individuals with disabilities because of the disability of such individuals in regard...to terms, conditions and privileges or employment.” 42 U.S.C. §12112(a) (2007). To recover on a claim of discrimination under the ADA, a plaintiff must show three things: (1) he is an individual with a disability; (2) he is ‘otherwise qualified’ to perform the job requirements, with or without reasonable accommodation; and (3) he was discharged solely by reason of his handicap. *Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 365 (2007). A suspension would be appropriate, or would be considered or could be analogized to a discharge. However, case law has specifically held “an employee who cannot meet the attendance requirements of the job at issue cannot be considered a qualified individual protected by the ADA.” *Gannt v. Wilson’s Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998). Thus, ADA does not excuse Appellant’s excessive tardiness.

4. As the Hearing Officer has found and concluded that the Cabinet acted appropriately and within its discretion, the Hearing Officer concludes the appeal should be dismissed.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ZANDRA O. GLASS V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS, (APPEAL NO. 2013-058)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

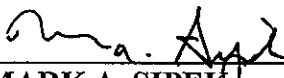
Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Kim Hunt Price** this 14th day of March 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Ms. Zandra Glass